

M I L L E R & V A N E A T O N
— P. L. L. C. —

MATTHEW C. AMES
KENNETH A. BRUNETTI*
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN
GAIL A. KARISH*
WILLIAM L. LOWERY
NICHOLAS P. MILLER
MATTHEW K. SCHETTENHELM
JOSEPH VAN EATON

*Admitted to Practice in
California Only

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
580 CALIFORNIA STREET
SUITE 1600
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 477-3650
FAX (415) 477-3652

WWW.MILLERVANEATON.COM

OF COUNSEL:

JAMES R. HOBSON
GERARD L. LEDERER
WILLIAM R. MALONE
NANNETTE M. WINTER†

†Admitted to Practice in
New Mexico Only

September 26, 2007

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of *ex parte* meeting in MB Docket No. 07-51, Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments.

Dear Ms. Dortch:

On September 25, 2007, representatives of the Real Access Alliance (“RAA”) met with Amy Blankenship of Commissioner Tate’s office in connection with the matter identified above. The RAA representatives were:

Betsy Feigin Befus, Vice President and Special Counsel, National Multi Housing Council
Jason Todd, Building Owners and Managers Association
Matthew C. Ames, Miller & Van Eaton, PLLC

During the meeting, the participants discussed the reasons that the RAA believes that exclusive agreements between property owners and video service providers for access to residential buildings should not be regulated by the Commission.

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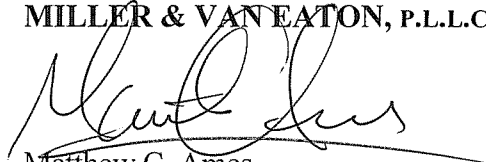
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A copy of the materials distributed at the meeting is attached.

Very truly yours,

MILLER & VAN EATON, P.L.L.C.

By


Matthew C. Ames

Attachment

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THE REAL ACCESS ALLIANCE OPPOSES FCC REGULATION OF EXCLUSIVE CONTRACTS FOR THE PROVISION OF CABLE SERVICE IN APARTMENT BUILDINGS AS BOTH UNNECESSARY AND UNLAWFUL

1. The Record Shows that Exclusive Agreements Are Not Hindering Competition. The Commission should rely on real evidence, not mere anecdote. For example, after identifying only a few specific instances, Verizon complains of being denied access to “tens of thousands” of units, neglecting to mention that Verizon has gained access to over 700,000 units in less than two years. There are 17.5 million apartment units nationwide, most of which are not subject to any form of exclusivity. Furthermore, nearly 400,000 new units are added every year, and existing agreements expire every day. The market offers competitors ample opportunities.

2. The ILECs Are Formidable Competitors and Tough Negotiators: They Simply Do Not Need the Commission’s Assistance.

- If the Commission’s goal is to improve access to the “triple-play,” the Commission must consider market power in relation to all three services, not just cable. Property owners cannot deny access to the ILECs, because a substantial number of apartment residents demand access to the ILECs’ services.
- The ILECs routinely refuse to install any facilities in newly-constructed buildings unless they are given access for the triple play. Furthermore, in both old and new construction the ILECs often demand exclusive agreements for voice service.

3. The Commission Has No Authority Over Bilateral Agreements Between Building Owners and Cable Providers for the Use of Space Inside Buildings.

- Section 628 clearly applies only to contracts between video distributors and programmers, and the Commission has ruled that Section 628 does not even apply to terrestrial delivery of satellite programming. It is not a general grant of authority over all the business practices of the cable industry. Section 628 confers no authority over property owners or the terms of access to buildings.
- Purporting to regulate the practices of cable operators does not merely result in an incidental effect on building owners: the entire purpose and effect of this proceeding is to regulate certain terms of two-party agreements governing the use of space inside buildings.

4. Banning Exclusive Agreements Will Not Lower Subscriber Rates.

- 5. Property Owners Oppose Commission Action Because the Next Logical Step Is Attempting To Create a Right of Entry.** How will the ban be enforced? What if an owner refuses to grant Verizon access because of some other term, such as the length of the agreement, or inability to agree on customer service standards in a building? Will Verizon go to the Commission and claim this is a *de facto* exclusive? Will the Commission acknowledge that it would have no power in such a dispute?
- 6. Exclusive Contracts Are a Central Part of a Functioning Market Mechanism.** Property owners rely on exclusive contracts to allocate scarce capital for network construction and service upgrades, and to recover their own costs of installing wiring and providing space to providers. It will be many years, if ever, before all residential buildings are served by multiple facilities-based providers offering the “triple play,” simply because some buildings are too small to support competitive providers.
- 7. Banning Enforcement of Existing Agreements Would Greatly Disrupt the Market, and Create Fifth Amendment Claims that Will Render Enforcement Difficult.**
- A retroactive ban would create needless turmoil, as cable operators would undoubtedly refuse to honor other terms of many existing agreements.
 - A retroactive ban would be unenforceable when exclusivity takes the form of an easement. Forcing the cable operator to share its exclusive easement is a *per se* physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because an easement is a property right.
 - In many other instances, a retroactive ban would raise claims of interference with settled “investment-backed expectations” and thus create a defense for the cable operator. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).
- 8. Two different but illuminating examples of the complexity of this issue:**
- In Loudoun County, Virginia, developer of Lansdowne granted OpenBand exclusive easements for video service. Verizon received separate easements for voice service. Adelphia sued for access to the easements. The court rejected the claim, preventing Adelphia from serving the community. To reverse this result in comparable cases, the Commission must have the power to effect a taking of the property in the easement; this is not just a matter of invalidating a contract term.
 - In Alexandria, Virginia, developer of Cameron Station granted similar exclusive easements that kept out not only Comcast but Verizon. In this case, resident demand for access to Verizon’s voice telephone service was so great that the developer eventually modified the easements to grant Verizon access.